A

Foong Seong Equipment Sdn Bhd (receivers and managers appointed) v Keris Properties (PK) Sdn Bhd (No 1)

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-02–168 OF 2007
LOW HOP BING, RAUS SHARIF AND ABU SAMAH JJCA
5 JUNE 2009

C

Contract — Joint venture — Joint venture agreement — Land developed for residential purposes — Landowner to get 25% of gross sale proceeds — Whether entitled to immediate payment of all gross sale proceeds — Whether housing legislation applicable to joint venture agreement

D

Statutory Interpretation — Construction of statutes — Purposive approach — Housing legislation — Whether to protect purchasers from becoming victims of abandoned housing projects — Whether construed purposively, beneficially and liberally in favour of purchasers

E

Pursuant to a joint venture agreement dated 4 May 1996 ('JVA'), the two pieces of land, owned by the appellant/plaintiff and U-Meng Corporation Sdn Bhd and U-Meng Holdings Sdn Bhd (collectively 'U-Meng'), were to be developed by the respondent/defendant, a licensed housing developer, on a joint venture basis for, inter alia, residential properties. Clause 2.1 of the JVA provided, inter alia, that the landowners would get 25% of the gross sale proceeds from the residential properties. The plaintiff had, prior to the appointment of receivers and managers, received advances from the defendant, amounting to RM2,421,681.63 between May and September 2003. Vide an originating summons filed in the Ipoh High Court against the defendant, the plaintiff prayed for, inter alia, a declaratory order that the plaintiff was entitled to receive from the defendant all gross sale proceeds and any other income derived from the development scheme under the JVA in the proportion of 11.8958% in respect of wholly residential properties. The learned High Court judge dismissed the prayer for residential properties and held that the plaintiff had to wait until the completion of the development of residential properties. Against the said decision the plaintiff appealed to this court. The issues raised were (a) whether the housing legislation was applicable to the JVA; and (b) if the answer is in the affirmative, then on a true construction of the relevant provisions of the JVA and the housing legislation, whether the plaintiff was entitled to immediate payment of all gross sale proceeds for the residential properties.

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I

Held, dismissing the appeal with costs:

(1) The JVA could not exist in a void or in isolation. As in all agreements, the JVA is to be construed subject to written laws generally, and the housing legislation specifically. Residential properties developed pursuant to the JVA are part and parcel of a housing development. These residential properties are intended to be sold to the purchasers. For the purposes of sale, the parties are required to execute individual sale and purchase agreements (see para 19).

(2) Where the vendor is the housing developer, but the proprietor of the land is a different entity, as in the JVA in the instant appeal, the recital and preamble to the contract of sale provide for a tripartite contract, which includes the vendor (of the first part), the purchaser (of the second part) and the proprietor of the land (of the third part) (see para 24).

(3) It was incorrect to say that the Act applies only to a developer's contract of sale with the purchaser, without the involvement of the proprietor of the land. The Act obviously involves the land proprietor who had entered into a joint venture agreement with the housing developer to develop the land on a joint venture basis, such as the JVA in the instant appeal (see para 25).

(4) As both the plaintiff and the defendant are parties to the JVA to which the provisions of the housing legislation would apply, they have a contractual obligation to strictly comply therewith, especially the Housing Development Account (see para 29).

(5) Withdrawal of monies from the Housing Development Account could only be done after the completion of the development of residential properties. The housing legislation does not provide for immediate payment of the gross sale proceeds to the plaintiff as a party in the JVA. The premature and immediate payment of all gross sale proceeds to the plaintiff would run counter to the interest of the purchasers of the residential properties (see para 36).

[Bahasa Malaysia summary

Berikutan dengan perjanjian usaha sama bertarikh 4 Mei 1996 ('PUS'), dua bidang tanah yang dimiliki oleh perayu/plaintif dan U-meng Corporation Sdn Bhd dan U-Meng Holdings Sdn Bhd (secara keseluruhannya 'U-Meng'), akan dimajukan oleh responden/defendan, sebuah pemaju perumahan berlesen, atas dasar usaha sama untuk, antara lain, hartanah perumahan. Klausa 2.1 PUS memperuntukkan, antara lain, bahawa pemilik-pemilik tanah akan mendapat 25% daripada jualan kasar hartanah perumahan tersebut. Plaintif, sebelum perlantikan penerima dan pengurus, telah

menerima bayaran pendahuluan daripada defendan, berjumlah RM2,421,681.63 antara Mei dan September 2003. Menerusi saman pemula yang difailkan di Mahkamah Tinggi Ipoh terhadap defendan, plaintif menuntut, antara lain, perintah perisytiharan bahawa plaintif berhak menerima daripada defendan kesemua keuntungan kasar jualan dan pendapatan lain daripada skim pembangunan tersebut di bawah PUS pada kadar 11.8958% bagi keseluruhan hartanah perumahan tersebut. Hakim Mahkamah Tinggi yang bijaksana menolak permohonan bagi hartanah perumahan tersebut dan memutuskan bahawa plaintif perlu menunggu projek tersebut siap. Tidak berpuas hati dengan keputusan itu, plaintif merayu ke mahkamah ini. Isu-isu yang dibangkitkan ialah (a) sama ada perundangan perumahan terpakai atas PUS tersebut; dan (b) jika jawapannya 'ya', maka atas pentafsiran yang tepat peruntukan-peruntukan PUS yang relevan dan perundangan perumahan, sama ada plaintif berhak atas bayaran serta-merta bagi keuntungan kasar keseluruhan penjualan hartanah perumahan tersebut.

Diputuskan, menolak rayuan dengan kos:

(1) PUS tersebut tidak boleh wujud dalam keadaan kosong atau berasingan. Seperti dalam semua perjanjian, PUS tersebut harus ditafsir tertakluk kepada undang-undang bertulis, secara amnya, dan undang-undang perumahan, secara khususnya. Hartanah perumahan yang dimajukan berikutan dengan PUS tersebut merupakan sebahagian daripada pembangunan perumahan tersebut. Hartanah perumahan ini adalah untuk dijual kepada pembeli-pembeli. Bagi tujuan penjualan, pihak-pihak dikehendaki menyempurnakan perjanjian-perjanjian jual beli bagi setiap pembeli (lihat perenggan 19).

(2) Di mana penjual merupakan pemaju perumahan, tetapi tuan punya tanah adalah entiti yang berbeza, seperti dalam PUS yang dalam rayuan ini, sebutan permulaan dan mukadimah kontrak jualan menyebut tiga pihak bagi kontrak tersebut, yang terdiri daripada penjual (pihak pertama), pembeli (pihak kedua) dan tuan punya tanah (pihak ketiga) (lihat perenggan 24).

(3) Adalah tepat untuk menyatakan bahawa Akta tersebut terpakai hanya ke atas kontrak jualan pemaju dengan pembeli, tanpa melibatkan tuan punya tanah tersebut. Akta tersebut jelasnya melibatkan tuan punya tanah yang telah menandatangani perjanjian usaha sama dengan pemaju perumahan untuk memajukan tanah tersebut atas dasar usaha sama, seperti PUS dalam rayuan ini (lihat perenggan 25).

(4) Memandangkan plaintif dan defendan merupakan pihak-pihak kepada PUS tersebut yang mana peruntukan-peruntukan undang-undang

perumahan terpakai, mereka mempunyai kewajipan kontraktual yang harus diikut secara ketat, terutamanya 'Housing Development Account' (lihat perenggan 29).

(5) Pengeluaran wang daripada 'Housing Development Account' hanya boleh dilakukan selepas penyempurnaan projek hartanah perumahan tersebut. Undang-undang perumahan tidak memperuntukkan bayaran serta merta bagi keuntungan kasar jualan kepada plaintif sebagai salah satu pihak dalam PUS tersebut. Bayaran pramatang dan serta merta bagi keseluruhan jumlah keuntungan kasar jualan kepada plaintif akan berselisih dengan kepentingan pembeli-pembeli hartanah perumahan tersebut (lihat perenggan 36).]

Notes

For cases on joint venture agreement, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4299–4300.

For cases on purposive approach, see 11 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1952–2009.

Cases referred to

City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd [1985] 1 MLJ 285, FC (distd)

City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd [1988] 1 MLJ 69, PC (distd)

Khaun Daw Yau v Kin Nam Realty Development Sdn Bhd [1983] 1 MLJ 335, HC (refd)

SEA Housing Corporation Sdn Bhd v Lee Poh Choo [1982] 1 MLJ 324; [1982] CLJ 355; [1982] CLJ 305 (Rep), HC (refd)

Tan Tien Seng & Anor v Grobina Resorts Sdn Bhd (No 2) [2006] 5 MLJ 372; [2005] 7 CLJ 70, HC (refd)

Tribunal Tuntutan Pembeli Rumah v Westcourt Corporation Sdn Bhd & other appeals [2004] 3 MLJ 17; [2004] 2 CLJ 617, CA (refd)

Westcourt Corporation Sdn Bhd lwn Tribunal Tuntutan Pembeli Rumah [2006] 1 MLJ 339; [2004] 4 CLJ 203, FC (refd)

Legislation referred to

Housing Development (Control and Licensing) Act 1966 s 24
Housing Developers (Control and Licensing) Regulations 1989 reg 11, Schedules H, G
Housing Development (Housing Development Account) Regulations 1991 regs 4, 7, 9, 12C
Interpretation Acts 1948 and 1967 s 17A

Robert Lazar (Gananathan Loh) for the plaintiff.
Leong Sai Wah (CK Leong & Co) for the defendant

Low Hop Bing JCA (delivering judgement of the court):

APPEAL

[1] Vide an originating summons filed in the Ipoh High Court against the respondent ('the defendant'), the appellant ('the plaintiff') prayed for, *inter alia, a declaratory order that pursuant to cl 2 the plaintiff is entitled to receive from the defendant all gross sale proceeds and any other income derived from the development scheme under the joint venture agreement in the proportion of 11.8958% in respect of wholly residential properties ('the prayer for residential properties')*.

[2] The learned High Court judge dismissed the prayer for residential properties and held that the plaintiff has to wait until the completion of the development of residential properties.

[3] This is the plaintiff's appeal against that decision.

UNDISPUTED FACTS

[4] By consent of the parties herein, U-Meng Corporation Sdn Bhd and U-Meng Holdings Sdn Bhd (collectively 'U-Meng') were granted leave to intervene in this appeal.

[5] The defendant does not dispute the appointment of receivers and managers ('R & M') for the plaintiff.

[6] The joint venture agreement dated 4 May 1996 ('the JVA') was entered into between the plaintiff, the defendant and U-Meng. The plaintiff is the owner of a piece of land, with an area of 133 acres. U-Meng is the owner of another piece of land with an area of 147 acres. Pursuant to the JVA, these two pieces of land are to be developed by the defendant, a licensed housing developer, on a joint venture basis for, inter alia, residential properties. (A reference hereinafter to a clause is a reference to that clause in the JVA).

[7] Clause 2.1 provides, inter alia, that the two landowners would get 25% of the gross sale proceeds from residential properties. More specifically, the plaintiff would get 11.8958% of all gross sale proceeds from residential properties.

[8] Other clauses, relevant to the instant appeal, viz cll 2.3.1 and 13.1, merit reproduction as follows:

(2.3.1) In respect of development falling within the housing developers

(Control and Licensing) Act 1966, the developer shall appoint Keris Properties Sdn Bhd of No. 31 Jalan Ali Pitchay, 30250 Ipoh, Perak as its main contractor and the Developer hereby undertakes to pay to the Landowners the Landowners' Entitlement supported by a statement of the sales and receipts within seven days of receipt of payments by Keris Properties Sdn Bhd from the Housing Development Account in respect of such development; and

(13) *HOUSING DEVELOPMENT ACCOUNT*

(13.1) Where the type of development within the Development Scheme falls within the Housing Developers (Control and Licensing) Act 1966, the Developer shall comply with such Act and the regulations there under in particular the Housing Development Account. The Developer shall be solely responsible for such Housing Development Account which will be operated by the Developer Provided Always the Landowners shall not be liable in any way whatsoever in respect of such Housing Development Account.

[9] The Housing Developers (Control and Licensing) Act 1966, referred to in cll 2.3.1 and 13.1 is now known as the Housing Development (Control and Licensing) Act 1966 ('the Act'). The Housing Development (Housing Development Account) Regulations 1991 ('the Regulations') were made under the Act to regulate the opening, management and maintaining of the Housing Development Account. (The Act, other regulations made thereunder, and the Regulations are collectively referred to in this judgment as 'the housing legislation').

[10] The plaintiff has, prior to the appointment of R & M, received advances from the defendant, amounting to RM2,421,681.63 between May and September 2003.

[11] The prayer for residential properties is allegedly based on cll 2.1, 2.3.1 and 13.1 and also the sale and purchase agreements entered into between the plaintiff, the defendant and third parties who are the purchasers of residential properties.

QUESTIONS FOR DETERMINATION

[12] The plaintiff's learned counsel Mr Robert Lazar argued for immediate payment of all gross sale proceeds from residential properties. He took the position that the housing legislation applies only to a developer's contract with the purchaser; and is inapplicable to the JVA. For this proposition, he referred to the Federal Court judgment in *City Investment Sdn Bhd v Koperasi*

Serbaguna Cuepacs Tanggungan Bhd [1985] 1 MLJ 285 (FC); and, on appeal, the advice of the Privy Council, as reported in [1988] 1 MLJ 69 (PC).

[13] The defendant's learned counsel Mr Leong Sai Wah advocated that the housing legislation applies to the JVA and that, on a true construction thereof, the plaintiff is not entitled to immediate payment under the prayer for residential properties.

[14] The above submissions raise two questions for determination viz:

(1) is the housing legislation applicable to the JVA? and

(2) if the answer to question one is in the affirmative, then on a true construction of the relevant provisions of the JVA and the housing legislation, is the plaintiff entitled to immediate payment of all gross sale proceeds under the prayer for residential properties?

IS HOUSING LEGISLATION APPLICABLE TO JVA?

[15] Before considering question one above, I shall first examine the authorities cited for the plaintiff.

[16] With the utmost respect, the facts and issues in *City Investment Sdn Bhd*, cited for the plaintiff, require no regurgitation here, as they are completely different from the facts and questions for determination in the instant appeal. Apart from commending the plaintiff's learned counsel for the effort expended by him, I am unable to identify anything in the judgment of the Federal Court and the advice of the Privy Council that can be reasonably construed as having contributed towards the strengthening of the case for the plaintiff herein.

[17] Question one concerns the applicability or otherwise of the housing legislation to the JVA. It deserves a more detailed discussion.

[18] The subject matter of the JVA revolves around two pieces of land. The parties have agreed to embark on housing development. Housing development is regulated by the housing legislation. The long title to the Act makes its intention abundantly clear. It is 'to provide for the control and licensing of housing development in West Malaysia and for matters connected therewith'. Clauses 2.1, 2.3.1 and 13.1 refer specifically to housing development as well as the housing legislation.

[19] The JVA cannot exist in a void or in isolation. As in all agreements, the JVA is to be construed subject to written laws generally, and the housing

legislation specifically. Residential properties developed pursuant to the JVA are part and parcel of housing development. These residential properties are intended to be sold to purchasers. For the purposes of sale, individual sale and purchase agreements are to be executed between the parties thereto.

[20] Section 24 of the Act confers on the Minister the power to make regulations for the purpose of carrying into effect the provisions of the Act. Pursuant thereto, the Housing Developers (Control and Licensing) Regulations 1989 were brought into existence. Regulation 11 thereof expressly provides for the standard form of contract of sale. It reads:

> 11 Contract of sale
>
> (1) Every contract of sale for the sale and purchase of a housing accommodation together with the subdivisional portion of land appurtenant thereto shall be in the form prescribed in Schedule G and where the contract of sale is for the sale and purchase of a housing accommodation in a subdivided building, it shall be in the form prescribed in Schedule H.

[21] A plain reading of the mandatory provisions contained in reg 11 reveals that it provides for two categories of the standard statutory sale and purchase agreement. The sale and purchase agreement for housing accommodation together with the subdivisional portion of land appurterent thereto shall be in the form prescribed in Schedule G. In the case of subdivided building, it shall be in Schedule H. The parties thereto are not permitted to contract out of it. As a general rule, compliance with these statutory contracts of sale is mandatory; an exception arises only with the approval of the controller of housing, in the form of a certificate in writing, in order to waive or modify the provisions thereof.

[22] The recital and preamble to the statutory contracts of sale expressly provide for the parties thereto.

[23] Where the vendor is both the housing developer as well as the proprietor of the land, the recital and preamble provide for a bilateral contract, to which the parties are the housing developer-cum-proprietor and the purchaser. The contract of sale allows the deletion of the particular part of the contract of sale which is not applicable.

[24] Where the vendor is the housing developer, but the proprietor of the land is a different entity, as in the JVA in the instant appeal, the recital and preamble to the contract of sale provide for a tripartite contract, which includes the vendor (of the first part), the purchaser (of the second part) and the proprietor of the land (of the third part).

[25] Hence, it is not correct to say that the Act applies only to a developer's contract of sale with the purchaser, without the involvement of the proprietor of the land. The Act obviously involves the land proprietor who has entered into a joint venture agreement with the housing developer to develop the land on a joint venture basis, such as the JVA in the instant appeal. In the circumstances, the above submission presented for the plaintiff is unsustainable. The answer to question 1 is therefore in the affirmative.

IS THE PLAINTIFF'S ENTITLEMENT IMMEDIATE?

[26] In relation to question two, it is to be noted that the defendant does not dispute the plaintiff's entitlement to the gross sale proceeds under cl 2.1 The bone of contention is directed to the plaintiff's entitlement to immediate payment thereof ie upon the signing of the individual sale and purchaser agreements by the purchasers.

[27] Clause 2.3.1 makes it abundantly clear that in respect of the development falling within the Act ie housing accommodation, in the form of residential properties, the undertaking by the defendant as developer is to pay the plaintiff, as landowner, the landowner's entitlement when it is supported by a statement of the sales and receipts within seven days of the receipt of payments from the housing development account. Clause 2.3.1 is to be construed within the context of the housing legislation, in particular the regulations which govern, inter alia, the opening, management and maintaining of the housing development account, in relation to residential properties. The immediate release of the gross sale proceeds from the housing development account upon the execution of the individual sale and purchase agreements with the purchasers would be premature, as it is not yet due and payable under the housing development account. The development for residential properties is still on-going and monies from the housing development account can only be released pursuant to the housing legislation, in particular the regulations made thereunder.

[28] Clause 13.1 expressly provides that where the development within the development scheme falls within the Act, the developer shall comply with the housing legislation, with particular reference to the housing development account. The residential properties being housing development under the JVA certainly fall within the housing legislation.

[29] As both the plaintiff and the defendant are parties to the JVA to which the provisions of the housing legislation would apply, they have the contractual obligations to strictly comply therewith, especially the housing development account.

[30] There is no dispute that the development of residential properties had already commenced when the R & M were appointed. The R & M had also attended the joint consultative committee meetings with all the relevant parties in accordance with the JVA. Therefore, the R & M had personal knowledge of the stages of development of residential properties vis-à-vis the Housing Development Account.

[31] Regulation 4 imposes a duty on the defendant, as a licensed housing developer, to deposit into the housing development account all monies paid by the purchasers pursuant to individual sale and purchase agreements. It reads as follows:

4 Deposit of all monies paid by purchaser:

(1) A licensed housing developer shall deposit forthwith into the housing development account all monies whatsoever, whether in respect of instalments of purchase price or otherwise, paid by a purchaser in relation to his purchase of a housing accommodation in a housing development.

(2) A licensed housing developer shall, within two (2) banking days after the payment is made in cash, issue a statement to the purchaser that such payment has been credited to the housing development account.

[32] Regulation 7 prohibits the withdrawal of the monies from the housing development account except for the specific purpose(s) stated therein only. Regulation 7 reads:

7 *Purposes for which monies in Housing Development Account may be withdrawn.*

No monies in housing development account of a housing development shall be withdrawn by a licensed housing developer except for all or any of the following purposes:

(a) ...

to

(o) ...

[33] I am unable to bring the plaintiff within any of the elaborate provisions which set out the exceptions to reg 7.

[34] It is only after the issuance of a certificate of fitness for the housing development ie after the completion of the housing development and the residential properties are certified fit for occupation that reg 9, with the

A approval of the controller of housing, permits the withdrawal of surplus monies from the account, in the following words:

> 9 *Withdrawal of surplus monies from Housing Development Account.*
>
> B After the issuance of a certificate of fitness for the housing development, the housing developer may, with the approval of the controller, withdraw any surplus monies in the housing development account after deducting:
>
> (a) The amount required to complete the housing development and the C sale and purchase under all the sale and purchase agreements in respect of the housing development as certified by the architect, engineer or quantity surveyor, as the case may be, in charge of the housing development;
>
> (b) Ten per centum (10%) of the amount referred to in paragraph (a) for D contingencies and inflation; and
>
> (c) All claims on liquidated damages that have been settled.

E **[35]** Contravention of any provision of the regulations is an offence under reg 12C which states:

> Any person who contravenes any provision under these Regulations shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to F both.

[36] Hence, it is abundantly clear that the withdrawal of monies from the housing development account can only be done after the completion of the G development of residential properties. The housing legislation does not provide for immediate payment of the gross sale proceeds to the plaintiff as a party in the JVA. The premature and immediate payment of all gross sale proceeds to the plaintiff would run counter to the interest of the purchasers of residential properties. H

[37] In relation to residential properties, the housing development account is obviously intended to protect the purchasers from becoming victims of abandoned housing projects. The housing legislation being a piece of social I legislation must be construed purposively, beneficially and liberally in favour of the purchasers.

[38] In *Tan Tien Seng & Anor v Grobina Resorts Sdn Bhd (No 2)* [2006] 5 MLJ 372; [2005] 7 CLJ 70 (HC) at p 77, I have the occasion to construe this

social legislation. The principles, relevant to the instant appeal, may be distilled as follows:

(1) it is trite law that the housing legislation is principally aimed at protecting the interest of purchasers: see *Malaysian Law on Housing Developers*, (2nd Ed) by Salleh Buang, 2002 pp 7 and 8; *SEA Housing Corporation Sdn Bhd v Lee Poh Choo* [1982] 1 MLJ 324; [1982] CLJ 355; [1982] CLJ 305 (Rep) per Suffian LP (as he then was); and *Khaun Daw Yau v Kin Nam Realty Development Sdn Bhd* [1983] 1 MLJ 335 at p 341 per VC George J (later JCA); and

(2) the Act is a piece of social legislation and hence its provisions should be given liberal and purposive interpretation ie to promote the general legislative purpose underlying the provisions (see s 17A of the Interpretation Acts 1948 and 1967; and *Tribunal Tuntutan Pembeli Rumah v Westcourt Corporation Sdn Bhd & Other Appeals* [2004] 3 MLJ 17; [2004] 2 CLJ 617; as affirmed in *Westcourt Corporation Sdn Bhd lwn Tribunal Tuntutan Pembeli Rumah* [2006] 1 MLJ 339; [2004] 4 CLJ 203 by the Federal Court through the judgment of Ahmad Fairuz CJ Malaysia).

[39] The answer to question two is therefore in the negative.

CONCLUSION

[40] The High Court's refusal to grant a declaratory order in terms of the plaintiff's prayer for residential properties is free from error and is hereby affirmed. The plaintiff's appeal is dismissed with costs. Deposit to the defendant on account of taxed costs. Consequentially, the defendant's appeal *No A-02(IM)-978 of 2008* relating to the stay of execution granted by the High Court in favour of the plaintiff is allowed with costs, and deposit to be refunded to the defendant.

[41] My learned brothers, Raus bin Sharif and Abu Samah bin Nordin JJCA have read this judgment in draft and have expressed their agreement with it to become the judgment of the court.

Appeal dismissed with costs.

Reported by Ashgar Ali Ali Mohamed